STATE OF MICHIGAN

COURT OF APPEALS

U.S. HEALTH AND LIFE INSURANCE COMPANY,

Petitioner-Appellee,

v

COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE SERVICES,

Respondent-Appellant,

and

HUSNIYEH BALALU,

Respondent.

UNPUBLISHED
April 26, 2007

No. 270466
Ingham Circuit Court
LC No. 04-001208-AA

Before: Neff, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Respondent Commissioner appeals by leave granted the trial court's order reversing the commissioner's decision that required petitioner insurer to cover its patient's injected arthritis prescription even though the insurer's policy generally excluded coverage for injected drugs. We vacate the trial court's order and the commissioner's decision and remand to the commissioner for clarification.

This case arose when respondent Balalu took several different prescription medications to treat her severe and aggressive rheumatoid arthritis, but discovered that only the injected prescription drug Enbrel assuaged her condition. Unfortunately for Balalu, her insurance policy with petitioner U.S. Health and Life specifically excluded injected drugs. Although petitioner initially vacillated about whether to provide coverage for Balalu's prescription, it ultimately determined that it would not pay for the drug. Balalu sought independent review with the commissioner's office pursuant to the Patient's Right to Independent Review Act (PRIRA), MCL 550.1901 *et seq*. Initially, the commissioner's office considered the matter a contractual issue, which was understandable given the clear and unambiguous exclusion from coverage. However, when the commissioner's office reevaluated the problem as one of medical necessity, more complicated issues arose.

A health insurer that limits its drug coverage to drugs on a specific list, or formulary, must provide exceptions to coverage when a non-covered drug is "medically necessary" to its insured. MCL 500.3406o. Therefore, under MCL 500.3406o, the commissioner could ordinarily find that Enbrel was "medically necessary" to Balalu and require U.S. Health and Life to provide coverage even if the drug was not included in U.S. Health and Life's formulary. However, when the commissioner's office asked to see U.S. Health and Life's formulary, the insurer plainly responded that it did not use a formulary of any kind, but had far-reaching coverage of every prescription drug, with certain exclusions of various categories of drugs. It contended that its lack of formulary rendered MCL 500.3406o irrelevant, because the statute clearly and unambiguously refers only to insurers that rely on formularies. It further argued that its policy's exclusion of injected drugs was not subject to revision by the commissioner, because exclusions do not per se violate the health and disability chapter of the insurance code, MCL 500.3400 *et seq*. The commissioner rejected U.S. Health and Life's argument and required it to pay for Balalu's Enbrel supply.

U.S. Health and Life appealed the decision to circuit court, whose standard of review was identical to ours. *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 455; 688 NW2d 523 (2004). Simply put, we must uphold the commissioner's decision if it was authorized by law. *Id*.; Const 1963, art 6, § 28. However, this simple standard presents some unusual difficulties in this case, because the commissioner's opinion only hints at its legal and factual basis. Although a cursory opinion is ordinarily understandable and appropriate in light of the fact that the informal process does not even require an evidentiary hearing, the issues presented here and below are peculiarly sensitive and potentially far-reaching, and the dearth of findings and reasoning substantially hampers our ability to engage in any meaningful review.

It appears from the record that the commissioner probably found that the policy's complex assortment of exclusions essentially functioned as a formulary, subjecting it to the statute. The policy excluded certain drugs by name and indirectly included insulin, by name, within its coverage. The policy also categorically limited coverage for HIV drugs, again addressing some by name. Throughout the policy's enumerated exclusions, categories and types of drugs appear and reappear in varying degrees of specificity. So perhaps the abbreviated lists satisfied the commissioner's unmentioned definition of a "formulary." We simply cannot tell.

Nor can we tell if the commissioner sought to define the term "formulary" so expansively that the statute's exclusive application (namely, its application to insurers that use formularies) would lose all meaning, which would certainly press the bounds of the commissioner's legal authority. Most importantly, we cannot determine if the commissioner's cursory reference to MCL 500.3406o indicates a finding that U.S. Health and Life actually relied on some type of formulary, or whether the commissioner simply disregarded U.S. Health and Life's lack of formulary and applied MCL 500.3406o, even though the statute plainly did not apply to it. If the commissioner took the latter course, then the decision, although fully comporting with the most rational view of the facts, was not authorized by law.

We note, however, that even if the commissioner found that U.S. Health and Life did not resort to a "formulary," then the chapter's catch-all provision, MCL 500.3468(1), may still warrant the commissioner's action. That statutory provision declares, "No policy provision which is not subject to sections 3406 to 3454 shall make a policy, or any portion thereof, less favorable in any respect to the insured or the beneficiary than the provisions thereof which are

subject to this chapter." MCL 500.3468(1). This provision suggests that U.S. Health and Life may not provide open-ended coverage for all prescription medications to obviate MCL 500.3406o and then piecemeal deselect the drugs it disfavors by categorically whittling them away with policy exclusions that are "not subject" to the chapter. *Id*.

However, we are not in a position to supplant the commissioner's decision with our own reasoning. We did not sit as factfinder in this case, and we will not interpret the relevance of these technical provisions on the basis of this scant record. Nor will we stand in the commissioner's way if the real goal was to provide a novel and binding interpretation of the term "formulary." We should not assume errors into a case or criticize a phantom determination. Instead, we should only review the record before us. In this case, we are simply unable to decipher any intent or clear legal direction from the commissioner's cursory citation to MCL 500.3406o, and we will not uphold or strike down an administration's interpretation of its governing statute on the basis of conjecture. Although we question whether the commissioner viewed the issue in the appropriate legal light, those questions do not translate into a conviction that, once placed in the proper light, the commissioner would reach a different result. Under the circumstances, our review is stymied by the sparseness of the record, so we remand to the commissioner for clarification of the relevant issues, findings, and conclusions.

The trial court's order and the commissioner's decision are vacated, and this case is remanded to the commissioner for clarification. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Christopher M. Murray